Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

BUDDY HERNANDEZ,

Petitioner,

v.

SUPERINTENDENT, FREDERICKSBURG
RAPPAHANOCK JOINT SECURITY CENTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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January 13, 1994

80 pp

Question Presented

Whether in stipulating to a *prima facie* case, a defendant presenting solely a collateral defense to a charge imposing strict statutory liability waives objections to an inferential, inculpating appellate "finding" of intent as a new element of the statutory charge first articulated by the appellate court on appeal, where that element does not appear in the statute and was not charged, at issue, conceded, or found at trial.

Parties to the Proceeding

The names of all the parties appear in the caption.

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Burns v. United States,
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Opinions Below

This petition arises out of a habeas corpus proceeding. The reported decision on the merits of petitioner's criminal appeal to the Virginia Court of Appeals, Commonwealth v. Hernandez, 406 S.E.2d 398 (Va. 1991), is reproduced in the appendix at A-1 - A-14. The unreported order denying the subsequent petition for appeal to the Virginia Supreme Court, Hernandez v. Commonwealth, Record No. 911102 (Va. Sup. Ct. Sept. 25, 1991), is reproduced in the appendix at A-15. The memorandum opinion and order of the United States District Court for the Eastern District of Virginia in the subsequent habeas corpus proceeding, Hernandez v. Superintendent, 800 F. Supp. 1344 (E.D. Va. 1992), are reproduced in the appendix at A-16 - A-55. The unreported opinion and order of the United States Court of Appeals, C.A. Nos. 92-6980 and

92-7139 (4th Cir. Oct. 21, 1993), are reproduced in the appendix at A-56 - A-57.

Jurisdiction

The United States Court of Appeals for the Fourth Circuit ruled on October 21, 1993. A-56 - A-57. This court has jurisdiction to review this ruling under 28 U.S.C. §1254(1).

Constitutional Provisions, Statutes and Rules Involved

The following constitutional provisions and statute are involved in this case.

1. The Fourteenth Amendment to the United States Constitution:

...[N]or shall any state deprive any person of life, liberty or property without due process of law....

2. Code of Virginia, §18.2-422:

It shall be unlawful for any person over sixteen years of age while wearing any mask, hood or other device whereby a substantial portion of the face is hidden or covered so as to conceal the identity of the wearer, to be or appear in any public place, or upon any private property in this Commonwealth without first having obtained from the owner or tenant thereof consent to do so in writing. However, the provisions of this section shall not apply to persons (i) wearing traditional holiday costumes; (ii) engaged in professions, trade, employment or other activities and wearing protective masks which are deemed necessary for the physical safety of the wearer or other persons; (iii) engaged in any bona fide theatrical production or masquerade ball; or (iv) wearing a mask, hood or other device for bona fide medical reasons upon the advice of a licensed physician or osteopath and carrying on his person an affidavit from the physician or osteopath specifying the medical necessity for wearing the device and the date on which the wearing of the device will no longer be necessary and providing a brief description of the device. The violation of any provisions of this section shall constitute a class 6 felony.

Statement of the Case

Petitioner Buddy Hernandez, a former member of the Ku Klux Klan, was arrested in Fredericksburg, Virginia on August 13, 1989 for wearing a masked Klan hood while peacefully distributing Klan literature with three other persons who were not masked. A-22. Mr. Hernandez was wearing masked hood because, in his words, "[i]t's part of the symbolic symbol of the Klan, you know, part of the costume." A-25 - A-26. At trial he testified that he believed in not being out of "full costume." A-26. There was no other evidence at trial probative of his intent relative to wearing his masked hood.

Following Mr. Hernandez' indictment under Code of Va. §18.2-422, he moved to quash the indictment on the grounds that the mask statute was unconstitutional under the first and fourteenth amendments to the United States

Constitution. In response to the motion, the Fredericksburg Commonwealth's Attorney sought, and the court offered, no narrowing construction of the statute. Specifically, there was no suggestion or holding that the statute included, as an element of the offense, the requirement that the mask-wearer intend to conceal his identity. The statute was treated as a strict liability offense by both the prosecutor and the court.

The matter came on for trial on December 19, 1989 before a judge of the Fredericksburg Circuit Court, sitting without a jury. As he had done twice previously, Mr. Hernandez stipulated to the government's prima facie case and mounted a first amendment defense. Since this stipulation is what ultimately cost Mr. Hernandez his relief below, it is appropriate to recite counsel's statement in full:

Mr. Glasberg: Judge, I can say this to expedite matters. As Your Honor is aware, if you have reviewed the pretrial proceedings in the case, there is no factual contest regarding the commission of the offense charged; and the sole defense, indeed, is a constitutional defense. I can at this point, perhaps, give the Commonwealth a hand by stipulating on behalf of the defendant, Buddy Hernandez, that being over sixteen years of age, he did wear the hood or other device whereby a substantial portion of his face was hidden or covered so as to conceal his identity and did appear in a public place in the City of Fredericksburg, on or about August 13th, 1989. Those facts are not at issue, and a prima facie case is conceded.

So far as I am aware, the sole purpose of this hearing today is to flesh out with some minimal evidence, or perhaps judicial notice, some elements of the affirmative constitutional defense in light of Judge Haley's ruling [that the Klan hood was not "communicative"]. I don't know if there is anything that the government needs to proceed with since we essentially stipulate to the facts in the case. I think that the hood should come into evidence, but other than that, I would present Mr. Hernandez and one other witness, unless the Court will take judicial notice of the status of the Ku-Klux-Klan hood. I am not asking -- I'm not debating with the Court. I accept the Court's ruling, but, of course, it was a preliminary matter and since appeals are likely in the case, it is

> appropriate to have an accurate evidentiary record to go forward, and that would be my suggestion. As I say, we stipulate to the facts that are indicated, essentially the facts in the indictment; and I would call Mr. Hernandez and then call one other witness unless the Court is prepared to take judicial notice of the hood as a Ku-Klux-Klan symbol.

The prosecution did not adduce evidence in support of any proposition that Mr. Hernandez had worn his hood for the purpose of hiding his identity, nor did the prosecution so contend. (Mr. Hernandez said that he believed in "full costume.") The government's case proceeded on a theory of strict criminal liability attaching to him for having masked his face in public.[1] In its judgment, the

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[1] See, e.g., the prosecutor's question to Mr. Hernandez intended to elicit an admission that he had done precisely what the statute prohibits:

> Q. Were you aware at the time that you were wearing the hood over your face that it was against the law in Virginia to cover your face with a hood or mask of any kind if

court made no finding, express or implied, to the effect that Mr. Hernandez had worn his hood with the intent of hiding his identity. The court rejected Mr. Hernandez' first amendment defense. He was convicted, sentenced to a term of thirty days in jail, suspended, and fined one thousand dollars.

Mr. Hernandez petitioned for appeal to the Virginia Court of Appeals, where he renewed his first amendment challenge to the mask statute. In response, the Office of the Virginia Attorney General, to which the case had now been referred, argued, for the first time, that §18.2-422 could be saved from unconstitutional overbreadth by construing it to require specific intent to hide one's

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> you were over sixteen years of age, so that your face or a substantial portion of it is concealed; and, therefore, your identity could not be ascertained by another person?

(Emphasis added.)

identity. The attorney general asked the appellate court so to narrow the statute.[2]

The appellate court accommodated the attorney general. By opinion dated June 18, 1991, the Court of Appeals undertook to save the mask statute by introducing into the offense a new element of intent to hide one's identity. Having done so, the court proceeded to affirm the conviction at bar, "finding," inferentially, that Mr. Hernandez must have intended to hide his identity since he had worn a mask.[3] A-7. The court affirmed his conviction on this basis.

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[2]There is no contention that at trial the prosecutor or the court was applying the narrowing construction proposed by the commonwealth on appeal.

[3]The court also found that the wearing of the mask was not constitutionally protected expressive activity. This issue is not presented here.

Mr. Hernandez petitioned for appeal to the Supreme Court of Virginia, arguing, inter alia, that he now stood convicted of a crime -- wearing a mask to hide his identity -- with which he had never been charged and against which he had not had an opportunity to mount a defense. By order dated September 25, 1991, the Supreme Court of Virginia denied Mr. Hernandez' petition for appeal, without opinion.

On February 7, 1992, Mr. Hernandez filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia pursuant to 28 U.S.C. §2254, alleging, inter alia, that he had been denied due process of law by virtue of the appellate-level finding of intent. By memorandum opinion and order dated August 26, 1992, the district court denied Mr. Hernandez' petition. The court held that Mr. Hernandez,

having stipulated to the government's prima facie case, could not challenge the new appellate-level finding of intent made against him. A-53. On October 6, 1992, the district court denied Mr. Hernandez' request for a certificate of probable cause permitting appellate review of its decision. Mr. Hernandez appealed to the Court of Appeals for the Fourth Circuit, which on October 21, 1993 summarily affirmed the district court. A-56 - A-57. This petition follows.

Reasons for Granting the Writ

Stipulation by a criminal or civil defendant to the plaintiff's prima facie case, where the defendant proposes to mount solely a collateral defense to a statutory charge, is a significant instrument of judicial economy and should be encouraged by the courts. If the price for so stipulating, however, is that the

stipulating party thereby waives any objection, however valid, to later inferential fact-finding relative to new elements added by whatever later judicial construction, no defendant will be prepared so to stipulate, even if, as here, the entire prima facie case under the (unconstrued) statute is conceded. This is a grossly inappropriate state of affairs which necessarily effects the entire judiciary adversely. It should not be permitted to remain in place. In the instant case, the result is also a miscarriage of justice for petitioner, who stands convicted of a crime which it was never proved he had committed and he never conceded having committed.

The United States district court did not reach the due process issues of notice and an opportunity to be heard on the issue of intent. It reasoned that Mr. Hernandez had

"waived" this claim by having conceded a prima facie case in the trial court. "In so doing," the district court held, "[petitioner] effectively assumed the risk that subsequent courts might view the statute differently from the way he then interpreted it." A-53.

This case, however, does not address judicial construction of statutes. It addresses whether appellate courts can make inculpating factual findings relative to a new element first articulated on appeal, following a trial where this element was not at issue or defended against. The district court's one-paragraph disposition of this matter, A-53, does not address this question. Nor did the court of appeals in merely adopting the district court's decision. A-57.

The decision below puts at risk any civil or criminal defendant who, conceding having done what a given statute proscribes but

wishing to mount a collateral attack on the statute or its application, stipulates to the opposing prima facie case. If, in so stipulating, the litigant is waiving a future objection were a court both to add and to "find" a judicially-created element not present at the time of stipulation, and thereby create liability which might avoid the collateral attack, no litigant could ever be advised to stipulate to a prima facie case, however undisputed it may be. The situation is exacerbated where, as here, the appellate finding is based on no evidence, is contrary to such evidence as is present,[4] and is at odds with the applicable law.[5]

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[4]Mr. Hernandez testified that he wore his mask so as to be in "full costume," as he preferred. A-26.

[5]The appellate court saved the mask statute by establishing intent to hide identity as a separate element of the offense. It thereupon found such intent in the mere fact that a mask was worn, in the complete

In the instant case, Mr. Hernandez conceded that he had done what the mask statute stated he could not do (i.e. worn his mask in public). It would have been senseless and abusive of judicial resources for him to have put the government to the proof of what he conceded. He thus stipulated to it, and proceeded with his first amendment defense. This was a reasonable thing to do, and the notion that in so doing he was abandoning the very position he was litigating (the constitutionality of the mask statute as then construed) is baseless. Nor was any such claim ever advanced by the government, until after the Virginia Court of Appeals came up with this theory.

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absence of any other evidence. Such a readily-reached inference nullifies the constitutionalizing gloss.

This court should vindicate the right of defendants to stipulate to conceded facts and claims where both the government and the trial court have deemed the offense at issue to be one of strict liability, without running unconscionable risks exemplified by those which Mr. Hernandez turns out to have run in this case.

> Notwithstanding the absence of express statutory language, this court has readily construed statutes that authorize deprivation of liberty or property to require that the government give the affected individual both notice and a meaningful opportunity to be heard.

Burns v. United States, 111 S. Ct. 2182, 2187 (1991).

Conclusion

The result in this case suggests that litigants should never stipulate to prima facie strict liability cases which they concede but seek to challenge collaterally,

for fear of having a court, at some later date, read intent -- or something else not at issue -- into their stipulation. This court should not permit such a state of affairs to persist. The court should thus issue a writ of certiorari to review the decision below.

Respectfully submitted,

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Counsel for Petitioner

Dated: January 13, 1994

APPENDIX

Buddy Merci HERNANDEZ

v.

COMMONWEALTH of Virginia.

Record No. 0353-90-2.

Court of Appeals of Virginia.

June 18, 1991.

Victor M. Glasberg (Jeanne Goldberg, Victor M. Glasberg & Associates, on briefs), for appellant.

Richard B. Smith, Asst. Atty. Gen. (Mary Sue Terry, Atty. Gen., on brief), for appellee

Present: BARROW, COLE* and WILLIS, JJ.

BARROW, Judge.

In this appeal, the appellant challenges the constitutionality of Code § 18.2-422, which prohibits a person from wearing a mask in public. He contends that the statute is

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*Judge Cole participated in the hearing and decision of this case prior to the effective date of his retirement on April 30, 1991 and thereafter by designation pursuant to Code § 17-116.01.

unconstitutional on its face and as applied to him. Appellant also contends that the trial court impermissibly considered his briefs in imposing punishment. We hold that Code § 18.2-422 is constitutional on its face and as applied to the appellant. Furthermore, we conclude that the trial court did not consider the appellant's briefs when it imposed sentence on him.

The appellant is a member of the Ku Klux Klan. Shortly after noon on Sunday, August 13, 1989, he was seen by the police wearing a long, white robe, a hood on his head, and a mask covering his entire face except for his eyes. He was standing on the sidewalk of a public street in Fredericksburg in front of a bank, directly across the street from a church. He had two companions. One was a woman wearing a long, white robe. According to the appellant, she held a hood in her

hands but did not wear it. The other companion, a man, was wearing a camouflage jacket. The police arrested the appellant for wearing a mask in public in violation of Code § 18.2-422.[1]

At trial, the appellant testified that he wore the hood as "part of the symbolic symbol of the Klan." A witness, Roger Kelly, described himself as the "Grand Dragon" of Virginia's Klan and testified that a Klansman has the option of wearing a mask or not but that "the uniform is set up to wear the mask."

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[1]Code § 18.2-422:

It shall be unlawful for any person over sixteen years of age while wearing any mask, hood or other device whereby a substantial portion of the face is hidden or covered so as to conceal the identity of the wearer, to be or appear in any public place, or upon any private property in this Commonwealth without first having obtained from the owner or tenant thereof consent to do so in writing.

At the conclusion of the evidence, the trial court found that the "mask is not a part of the, a necessary part, of the symbolic speech of this particular organization." The trial judge explained that "this organization and its members can express themselves fully without the need for that liner or that mask to go across the face."

The appellant first argues that Code § 18.2-422 is unconstitutional on its face because it is overbroad. He contends that, regardless of whether his own conduct may constitutionally be regulated, the statute impermissibly deters or "chills," constitutionally protected expression. See Gooding v. Wilson, 405 U.S. 518, 520-21, 92 S.Ct. 1103, 1105, 31 L.Ed.2d. 408 (1971); Dombrowski v. Pfister, 380 U.S. 479, 491, 85 S.Ct. 1116, 1123, 14 L.Ed.2d. 22 (1965).

In order to find this statute facially invalid, we must first determine whether it "reaches a substantial amount of constitutionally protected conduct." Boos v. Barry, 485 U.S. 312, 329, 108 S.Ct. 1157, 1168, 99 L.Ed.2d 333 (1988). The chilling effect on legitimate expression must be both "real and substantial." Erznoznik v. City of Jacksonville, 422 U.S. 205, 216, 95 S.Ct. 2268, 2276, 45 L.Ed.2d 125 (1975). However, the statute "should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts." Id.

The appellant argues that the statute prohibits persons from wearing ski masks in the winter, Muslim women from wearing traditional outfits covering their faces, widows from wearing black veils, and other similar face coverings. He argues that this

prohibition is unconstitutional because it criminalizes personal expression. We decline to read Code § 18.2-422 as broadly as the appellant suggests we should.

The statute makes it illegal for any person over the age of sixteen to appear in a public place wearing a mask covering a substantial part of the face "so as to conceal the identity of the wearer." Code § 18.2-422. These words "so as to conceal the identity" express a requirement of intent. Therefore, to violate the statute, an individual must intend to conceal his identity by covering his face. See State v. Miller, 260 Ga. 669, 674, 398 S.E.2d 547, 552 (1990). So construed, this statute does not prohibit the masking of one's face for a purpose other than concealing one's identity, such as protection from cold weather, expression of grief, or practice of a

religion.

The appellant contends that the record does not support a finding that he intended to conceal his identity. He contends that the evidence showed only that he wore the mask for symbolic purposes, not concealment. We disagree. A trier of fact may infer that a person intends the natural consequences of his or her acts. Kelly v. Commonwealth, 8 Va.App. 359, 373, 382 S.E.2d 270, 278 (1989). Therefore, evidence in this case that the mask covered the appellant's face except for his eyes was sufficient to support the verdict. The trier of fact was free to accept or reject the appellant's testimony or any other evidence concerning a contrary intent.

The appellant also argues that the statute is unconstitutional as applied to him because it penalizes him for engaging in

disfavored symbolic speech. This is so only if the appellant's wearing of the mask constitutes expressive activity permitting him to invoke the first amendment. See Texas v. Johnson, 491 U.S. 397, 402-03, 109 S.Ct. 2533, 2538, 105 L.Ed.2d 342 (1989). In order for appellant's conduct to fall within the scope of first amendment protection, he must have intended to convey a particularized message by wearing the mask, and there must have been a great likelihood that the message would be understood by those who viewed it. Id. at 404, 109 S.Ct. at 2539.

This record does not support a finding that the wearing of a mask conveyed a particularized message that would have been likely to have been understood by those who viewed it. The record does not establish, as the appellant contends, that the mask is so identified with the Ku Klux Klan that it is a

symbol of its identity. The robe and the hood may be such symbols, but the mask is not. The mask worn without the robe and the hood would be meaningless. The mask adds nothing, save fear and intimidation, to the symbolic message expressed by the wearing of the robe and the hood. Without the mask, the social and political message conveyed by the uniform of the Ku Klux Klan is the same as it would be with the mask.

Even if the wearing of the Ku Klux Klan mask constitutes expressive conduct protected by the first amendment, the statute is constitutional if its purpose is unrelated to the suppression of free expression. Id. at 403, 109 S.Ct. at 2538. A statute which restricts expressive conduct because of the message it conveys is subject to "the most exacting scrutiny." Id. at 412, 109 S.Ct. at 2543. On the other hand, a statute which is

directed at the "secondary effects" of the regulated speech, and whose justification has nothing to do with that speech is content-neutral. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48, 106 S.Ct. 925, 928-29, 89 L.Ed.2d 29 (1986) (ordinance regulating adult theaters properly analyzed as content-neutral when justifications include prevention of crime, maintenance of property values, and protection of residential neighborhoods). A statute is content-neutral if it is one in which "the governmental interest is unrelated to the suppression of free expression." United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968). Such as statute is constitutional so long as it furthers an important governmental interest and "the incidental restriction on alleged First Amendment freedoms is not

greater than is essential to the furtherance of that interest." Id.

We acknowledge that the legislature's original motivation for enacting the anti-mask statute may have been to "unmask the Klan." The statute was, after all, created in the same act with statutes prohibiting cross burning and intimidation, activities historically associated with the Klan. See 1952 Va.Acts c. 483. However, whatever motivation might have prompted the anti-mask statute's enactment, the purpose of the statute is no more than what appears in the plain language of the statute. See Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985). The statute simply forbids the wearing of masks under certain circumstances. An obvious justification for such a prohibition is the prevention of violence, crime and disorder by the unmasking of

potential criminals. For example, a potential rapist or bank robber wearing a mask could just as easily be prosecuted under this statute as a Klansman. See Commonwealth v. Ballentine, No. CR89-395 (Cir. Ct. of the City of Roanoke Sept. 6, 1989) (defendant wearing ski mask in the commission of abduction, sodomy, rape and robbery convicted of wearing mask).

The plain language of Code § 18.2-422 indicates no purpose to stifle the Klan's freedom of expression. Further, nothing in the record shows an indiscriminate enforcement of the statute against members of the Klan. The justification for prosecuting an individual under this statute is the same whether or not that individual is a Klansman. The incidental effect of preventing a Klansman, such as the appellant, from wearing his "full costume" is minor when compared to

the government's interest in keeping communities safe and free from violence. We conclude therefore, that Code § 18.2-422 is not unconstitutional as applied to the appellant.

Finally, the appellant contends that a comment by the trial court at the sentencing hearing demonstrated that the court impermissibly punished the appellant for his disfavored views. Before sentencing the defendant, the trial judge stated that, "[d]espite the fact that I disagree with [the appellant's beliefs] wholeheartedly, I am not going to punish him unduly because of those beliefs."

The appellant misinterprets the trial judge's comment. The appellant would read the remark to mean that the trial judge was going to punish the appellant because of his beliefs, but not to an extent to which the

appellant was not due. We, however, read this remark to mean that the trial court would not punish him because of his beliefs to an extent to which he would not otherwise be deserving. Neither the record nor the sentence which was imposed (a thirty day jail sentence suspended and a $1,000 fine) reflects that the appellant's unpopular views in any way were considered by the trial court in its imposition of sentence.

For these reasons, we conclude that the judgment of conviction should be affirmed.

Affirmed.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 25th day of September, 1991.

Buddy Merci Hernandez, Appellant,

against Record No. 911102
Court of Appeals #0353-90-2

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach,
Clerk

By: /S/

Deputy clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

BUDDY HERNANDEZ,	)	
	)	
Petitioner,	)	
	)	
v.	)	C.A. #92-0189-AM
	)	
SUPERINTENDENT, FREDERICKSBURG-RAPPAHANOCK JOINT SECURITY CENTER,	)	
	)	
Respondent.	)	

ORDER

This matter is before the Court on a Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus.

For the reasons stated in the Memorandum Opinion issued this day and attached hereto, the petition should be, and hereby is, **DENIED.**

The Clerk is directed to send copies of this Order to all counsel of record.

/S/

Alexandria, Va
August 26, 1992

T. S. Ellis, III
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

BUDDY HERNANDEZ,	)	
	)	
Petitioner,	)	
	)	
v.	)	C.A. #92-0189-AM
	)	
SUPERINTENDENT, FREDERICKSBURG-RAPPAHANOCK JOINT SECURITY CENTER,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

This § 2254 action challenges a state court conviction for violation of a statute proscribing mask-wearing that conceals the wearer's identity. In essence, petitioner, a Ku Klux Klan ("Klan") member, was arrested while distributing Klan propaganda in full klan regalia, including a mask. He was subsequently convicted of violating Virginia Code § 18.2-422, which prohibits wearing a

mask covering the face so as to conceal the identity of the wearer.

Petitioner asserts three grounds for relief. First, he claims the Virginia statute, as applied to him, violates his free speech rights guaranteed by the First and Fourteenth Amendments. Second, he contends that the Virginia Court of Appeals denied his Due Process because it improperly found as a matter of fact that he wore a mask to conceal his identity. And finally, petitioner claims the trial judge impermissibly imposed an unduly harsh sentence to punish petitioner for his Klan beliefs.

Respondent has filed a motion to dismiss. As a threshold matter, respondent argues that Teague v. Lane, 489 U.S. 288 (1989), and its progeny foreclose federal de novo review of petitioner's claims and that this Court must defer to the state court's adjudication of the

constitutional issues. Beyond this, respondent argues that even assuming, arguendo, the availability of federal habeas review, petitioner's claims are meritless. In the course of oral argument on respondent's motion to dismiss, the parties agreed to submit the matter to the court on the existing record. Given this stipulation and given the absence of any material factual disputes, this matter is now ripe for summary disposition.

I.

In August 1989, petitioner was arrested on a felony charge of wearing a mask in public, in violation of Virginia Code § 18.2-422.[2] On the day of his arrest, petitioner

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[2]Virginia Code § 18.2-422 provides as follows:

> It shall be unlawful for any person over sixteen years of age while wearing any mask, hood or other device whereby a substantial portion of the face is

hidden or covered so as to conceal the identity of the wearer, to be or appear in any public place, or upon any private property in this Commonwealth without first having obtained from the owner or tenant thereof consent to do so in writing. However, the provisions of this section shall not apply to persons (i) wearing traditional holiday costumes; (ii) engaged in professions, trades, employment or other activities and wearing protective masks which are deemed necessary for the physical safety of the wearer or other persons; (iii) engaged in any bona fide theatrical production or masquerade ball; or (iv) wearing a mask, hood or other device for bona fide medical reasons upon the advice of a licensed physician or osteopath and carrying on his person an affidavit from the physician or osteopath specifying the medical necessity for wearing the device and

was in Fredericksburg, Virginia, with two other persons for the purpose of distributing Klan literature. He was dressed in full Klan regalia, including a robe outfitted with a hood and a mask covering his face. The second member of the group, a woman, also wore the Klan robes, but wore no hood or mask. The third member of the group was attired in casual street clothes and wore no mask or Klan costume. A police officer dispatched to the scene found petitioner and his companions handing out Klan material on a sidewalk in the downtown business section of Fredericksburg. The officer approached the group and informed petitioner that he was under arrest for

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> the date on which the wearing of the device will no longer be necessary and providing a brief description of the device. The violation of any provisions of this section shall constitute a Class 6 felony.

wearing a mask in public. Petitioner then removed his mask and handed it to the woman in the group. Arrested solely on the mask-wearing charge, petitioner was peaceful and cooperative throughout his arrest. The officer did not arrest petitioner's companions, but admonished them not to block traffic by standing in the roadway.

On September 22, 1989, petitioner, by counsel moved for dismissal of the mask-wearing charge during the preliminary hearing held in the General District Court for the City of Fredericksburg. Petitioner argued that the statute was unconstitutional on its face and as applied to him because it violated the Free Speech Clause of the First Amendment. That court declined to rule on the constitutionality of the statute and found probable cause to certify the charge to the grand jury. The grand jury returned an

indictment against petitioner charging him with violating Virginia Code § 18.2-422. Petitioner subsequently filed a pre-trial motion to suppress the indictment. In a hearing before the Circuit Court for the City of Fredericksburg,[3] petitioner argued that his wearing of a mask, in this instance a mask attached by snap-fasteners to the traditional Klan hood, constituted an expression of symbolic speech, and therefore any attempt to suppress that symbolic speech violated his First Amendment right of expression. The Circuit Court disagreed, finding that the act of wearing a mask "is not communicative and articulates no specific idea," and was therefore not entitled to constitutional protection. Recognizing that § 18.2-422 was

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[3]Circuit courts are Virginia's general jurisdiction trial courts of record. General district courts are limited jurisdiction courts not of record.

enacted to curb Klan activities, the Circuit Court further found that even if the wearing of a mask were symbolic speech, the statute's specific provisions had only a minimal impact on the right of free expression and served a compelling government interest in protecting the "political and social privileges" of its citizens.

Petitioner's bench trial was held in the Circuit Court of the City of Fredericksburg. At trial, petitioner's counsel stipulated that petitioner was wearing the mask in violation of the statute. Counsel asserted that petitioner's only defense was a "constitutional" one. Petitioner testified on his own behalf. Under cross-examination he stated he was a Klan member distributing Klan literature when arrested. He asserted he was wearing the Klan costume, including the face-covering mask, because in his words, "[i]t's

part of the symbolic symbol of the Klan, you know, part of the costume." When asked why he had covered his face while his robed companion had not, petitioner responded that he believed in "full costume."

The "Grand Dragon" of the Virginia Klan, Roger Kelly, also testified for petitioner. Kelly stated that the hood was one of the symbols of the Klan. He related that when a Klan costume is ordered from the commercial manufacturer, the mask is automatically included with the hood. On cross-examination, Kelly described the mask as connected to the hood by three snaps so that it is detachable. Kelly conceded that the mask was an optional part of the Klan costume.

The trial judge rejected petitioner's constitutional defense. Based on the evidence that the mask was detachable and an optional part of the costume, the judge found that the

mask was not part of the Klan's symbolic speech. Accordingly, the trial judge found petitioner guilty of the charge. At sentencing, the trial judge imposed on petitioner a 30-day jail sentence, suspended on the condition of five years' good behavior, and a fine of $1,000. Petitioner appealed his conviction to the Court of Appeals of Virginia. On appeal, petitioner asserted that § 18.2-422 was unconstitutional on its face, that it was unconstitutional as applied to him, and that the trial judge impermissibly punished him for his Klan beliefs. After briefing and oral argument, the Court of Appeals rejected petitioner's contentions and affirmed the conviction and sentence. Hernandez v. Commonwealth, 406 S.E.2d 398 (1991). Petitioner then filed a petition for appeal to the Supreme Court of Virginia. On September 25, 1991, that court denied the

petition. Thereafter petitioner filed the instant § 2254 action, in which he asserts his conviction was unconstitutional and should be set aside for the following reasons:

(1) Virginia's mask-wearing prohibition violates the First and Fourteenth Amendments guarantees of freedom of speech, due process, and equal protection as applied to petitioner;

(2) the Virginia Court of Appeals violated petitioner's Fourteenth Amendment right to due process by finding, at the appellate level, that petitioner, who was presumed to intend the ordinary and natural consequences of his acts, had worn the mask to conceal his identity; and

(3) the unduly harsh sentence was imposed in retribution for petitioner's espousal of Klan beliefs, in violation of his First and Fourteenth Amendment rights.

II.

The threshold issue is whether, as respondent argues, Teague v. Lane, 489 U.S. 288 (1989), bars this Court review of the petition. Distilled to its essence, Teague holds that with two exceptions not applicable here,[4] a new rule will not be retroactively applied to void a conviction that was final when the new rule was announced. Post-Teague decisions have clarified various practical details concerning the retroactive application of new rules in habeas cases. These decisions are summarized in this Court's opinion in Hawkins v. Murray, ___ F. Supp. ___ (E.D. Va.

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[4]The first exception allows retroactive application of a new rule if the rule puts certain private conduct beyond the reach of State proscription. See Teague, 489 U.S. at 311. The second exception involves so-called "watershed" rules of criminal procedure. See id. The dispositive rules here are neither "watershed" procedural rules nor rules that render certain private conduct immune from State proscription.

1992).

[Stringer v. Block, ___ U.S. ___, 112 S.Ct. 1130 (1992)] established a two step process for applying the Teague doctrine. First, the district court must determine whether the decision relied on by the petitioner announces a new rule. Id. at 1135. A decision establishes a new rule "when it breaks new ground or imposes a new obligation on the States or the Federal Government." Teague, 489 U.S. at 301. If the habeas decision requires the application of a new rule, then the district court must decide whether either of the two Teague exceptions applies. Second, "[i]f, however, the decision did not announce a new rule, it is necessary to inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent." Id. (citing Butler v. McKellar, 494 U.S. 407 (1990)) (emphasis added). Under the second step, a

> decision "creates" a new rule "if the [habeas] result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301 (emphasis in original). And a result is not dictated if it is "susceptible to debate among reasonable minds." Butler v. McKellar, 494 U.S. at 415. Through this formulation, the Supreme Court sought to "validate reasonable, g o o d - f a i t h interpretations of existing precedents made by state courts even though they are shown to be contrary to late decisions." Id.

In sum, federal courts on habeas review cannot overturn state court convictions on the basis of rules announced since the date of the conviction or on the basis of rules not dictated by controlling precedent in effect at

the time the conviction became final.[5]

Applied here the Teague-Stringer principles point persuasively, if not conclusively, to the conclusion that the disposition of the issues at bar involves neither a "new rule," nor "the creation" of a new rule. No "new rule" is involved as neither petitioner nor respondent relies on any decision announced after petitioner's conviction became final. Similarly,

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[5]It is difficult not to see a progressive narrowing of the scope of habeas review from Brown v. Allen, 344 U.S. 443 (1953), to Teague. See Hawkins v. Murray, ___ F. Supp. ___ (E.D. Va. 1992) Yet, the Fourth Circuit in West v. Wright, 931 F.2d 262 (1991), rev'd on other grounds, ___ U.S. ___, 112 S.Ct. 2482 (1992), rejected the motion that Teague and its progeny created a new and more restrictive habeas review standard. The Supreme Court reversed on other grounds, but declined to say whether Teague and its offspring created a new standard of habeas review. Wright ___ U.S. at ___, 112 S.Ct. at 2492 (citing the Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979), test, the Supreme Court reversed the Fourth Circuit's conclusion that the evidence was insufficient to support the conviction.)

disposition of petitioner's claims "creates" no new rule; rather, the result here is compelled by precedent existing at the time petitioner's conviction became final.

III.

The Virginia anti-mask statute in issue here is of a genre not uncommon in this country. At least a dozen states have enacted such laws. They typically fall into one of two categories. The first category consists of statutes that prohibit public mask wearing where the wearer's identity is concealed with the intent to interfere with the civil rights of another.[6] Laws that fall into the second category, of which § 18.2-422 is an example, prohibit public mask wearing that conceals the identity of the wearer, but provide for

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[6]See, e.g., N.M. Stat. Ann. §30-22-3 (1984); Conn. Gen. Stat. § 53-37(a) (1989); Del. Code Ann. tit. 11, § 1301(1)(g) (1987).

certain specific exceptions.[7] Commentators have traced the origin of both categories of laws to efforts to combat the Klan's illegal, violent activities.[8] Because the reach of these statutes sometimes extends to expressive conduct of various kinds, it is not surprising that they have been the focus of variety of constitutional attacks not unlike those

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[7]See, e.g., Ga. Code Ann. § 16-11-38(a) (1988); Ala. Code § 13A-11-9(a)(4) (1982); Fla. Stat. §§ 876.12, 876.13 (1987); La. Rev. Stat. Ann. § 14:313 (West 1986); Mich. Comp. Laws § 750.396 (1979); Minn. Stat. § 609.735 (1990); N.C. Gen. Stat. §§ 14-12.7, 14-12.8, 14-12.11 (1986); Okla. Stat. tit. 21, § 1301 (1981); and W.Va. Code § 61-6-22 (1989).

[8]See, e.g., Note, Klan, Cloth & Constitution: Anti-Mask Laws & the First Amendment, 25 Ga.L.Rev. 819 (1991); Rey, Antimask Laws: Exploring the Outer Bounds of Protected Speech Under the First Amendment--State v. Miller, 260 GA. 669, 398 S.E.2d 547 (1990), 66 Wash.L.Rev.1139 (1990).

From the perspective of the 1990's, it is easy to lose sight of the Klan's history of vicious racist violence against blacks. See David Chalmers, Hooded Americanism: The First Century of the KKK, 1865 - 1965 (1965).

asserted by petitioner in this case.[9] Specifically, petitioner here claims (i) that § 18.2-422, as applied to him, precludes him from wearing a symbol of his Klan beliefs and thus unconstitutionally infringes his free speech rights; and (ii) that the statute denies him equal protection of laws by distinguishing between snap-ons masks and masks integral to the hood. Petitioner also claims that he was denied due process in the state court proceeding, and that the trial judge imposed an unduly harsh sentence for the impermissible purpose of punishing him for his Klan beliefs. Each of these claims is separately addressed.

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[9]For a list and summary of such cases, see Annot. Validity and Construction of State Statute or Ordinance Prohibiting Picketing, Parading, Demonstrating, or Appearing in Public While Masked or Disguised, 2 A.L.R.4th 1241 (1980 and 1991 Supp.).

Symbolic Speech

In addressing matters of free speech, courts must be mindful that "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414, 109 S.Ct. 2533, 2544 (1989) (citations omitted) (burning the American flag during political protest rally was constitutionally-protected speech). Yet freedom of speech under the Constitution is not absolute.[10] The threshold issue in First Amendment analysis, therefore, is whether the "speech" in question is constitutionally-

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[10]See Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766 (1942) (recognizing a narrow class of unprotected "speech," including the lewd and obscene, the profane, the libelous, and the insulting or "fighting words").

protected. It is well-settled that the First Amendment's protection of freedom of speech extends beyond traditional verbal and written communication; it also protects certain forms of communicative conduct or "symbolic speech."[11] As the Supreme Court stated in Johnson:

> The First Amendment literally forbids the abridgement only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," United States v. O'Brien, [391 U.S. 367, 376, 88 S.Ct. 1673, 1678 (1968)], we

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[11]See, e.g., Johnson, 491 U.S. at 404, 109 S.Ct. at 2539 (flag-burning during political protest rally); Schact v. United States, 398 U.S. 58, 90 S.Ct. 1555 (1970) (wearing American military uniforms in drama criticizing Untied States' involvement in Vietnam War); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 509, 89 S.Ct. 733 (1969) (wearing black armbands as protest against United States' involvement in Vietnam War).

> have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." Spence [v. Washington, 418 U.S. 405, 409, 94 S.Ct. 2727, 2730 (1974)].

491 U.S. at 404, 109 S.Ct. at 2539.

The test for determining whether conduct qualifies as protected "speech" is whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." Johnson, 491 U.S. at 404, 109 S.Ct. at 2539 (quoting Spence, 418 U.S. at 410-11, 94 S.Ct. at 2730). Thus, proof of three elements is required to establish that conduct is communicative or expressive within the meaning of a First Amendment analysis: (i) requisite intent; (ii) a particularized message; and (iii) likely understanding by viewers. The nature and context of the conduct are essential

considerations in the application of this test. See Spence, 481 U.S. at 409-10, 94 S.Ct. at 2730 (flag hung upside down with peace symbol attached displayed at a time roughly simultaneous with the Kent State tragedy and United States' incursion into Cambodia was protected expression); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 89 S.Ct. 733 (1969) (black armbands worn in a school environment conveyed unmistakable message of concern about Vietnam hostilities). If the conduct in question is not communicative or expressive under this test, no First Amendment protection attaches. Accordingly, a First Amendment challenge to a statute proscribing that conduct fails. If, on the other hand, conduct is found to be communicative or expressive, a court must then proceed to consider whether a statute proscribing that conduct impermissibly

restricts symbolic speech.

Generally, the government "has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." Johnson, 491 U.S. at 406, 109 S.Ct. at 2540. See also O'Brien, 391 U.S. at 376-77, 88 S.Ct. at 1678-79; Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 104 S.Ct. 3065, 3068 (1984). What the government may not do, however, is proscribe certain conduct because it has expressive content; hence, any law directed at the communicative aspect of conduct must be justified by a substantial showing of need by the government, a showing that must survive "the most exacting scrutiny." Johnson, 491 U.S. at 412, 109 S.Ct. at 2543-44 (quoting Boos v. Barry, 485 U.S. 312, 321, 108 S.Ct. 1157, 1164 (1988)). Where, on the other hand, the government's asserted interest is unconnected to the

suppression of free expression, a lower standard of review applies:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of tan interest.

O'Brien, 391 U.S. at 377, 88 S.Ct. at 1679. This more lenient test applies if (i) the government's asserted interest is unrelated to the suppression of expression; and (ii) that interest is implicated on the facts presented. See Johnson, 491 U.S. at 407, 109 S.Ct. at 2541. If either of these elements is absent, the higher "substantial showing" test applies.

Here, the burden is on petitioner to demonstrate, in the first instance, that his mask-wearing amounted to constitutionally-protected symbolic speech. See Clark, 468

U.S. at 293 n.5, 104 S.Ct. at 3069 n.5. The record reflects that petitioner's proof fell short in this regard. At trial, petitioner testified that he was wearing the official Klan costume and that he wore a mask because it was "part of the symbolic symbol of the Klan." See Hernandez, 406 S.E.2d at 399. He also acknowledged that his female companion, who was not arrested, wore the same type of costume, but without the hood or mask. Another witness, Roger Kelly, self-described "Grand Dragon" of Virginia's Klan, testified that the pointed hood was a Klan symbol, but that wearing a detachable mask was optional. Id. Thus, Mr. Kelly's testimony on the issue of the significance of the mask differed from petitioner's testimony. At the close of the evidence, the trial court concluded that "the mask is not part of the, a necessary part, of the symbolic speech of this particular

organization" and that "this organization and its member can express themselves fully without the need for that liner or that mask to go across the face." Id. Thereafter, the Court of Appeals of Virginia upheld the trial court, concluding that "the record does not support a finding that the wearing of a mask conveyed a particularized message that would have been likely to have been understood by those who viewed it." Id. at 400.

These findings by the state courts are mixed findings of fact and law requiring the application of legal principles to historical facts. See Cuyler v. Sullivan, 446 U.S. 335, 342, 100 S.Ct. 1708, 1715 (1980). Pursuant to the applicable habeas statute, 28 U.S.C. § 2254, state court findings of fact are presumed correct on federal habeas review absent the presence of one of eight enumerated factors negating that presumption. See 28

U.S.C. §2254(d).[12] See also Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764 (1981). Thus, to the extent the Virginia state courts' findings are factual, they are presumed correct because none of the statutory negating factors are implicated on the record presented. See 28 U.S.C. § 2254. In particular, the factual finding that members of this particular Klan organization fully express themselves without the use of the mask is sufficiently supported

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[12]The eight factors are: (i) that the merits of the factual dispute were not resolved in the state court hearing; (ii) that the factfinding procedure in the state court was inadequate; (iii) that the material facts were not adequately developed in the state court proceeding; (iv) that the state court lacked subject matter or personal jurisdiction; (v) that the state court deprived an indigent petitioner of his constitutional rights by failing to appoint counsel; (vi) that the petitioner did not receive a full, fair, and adequate hearing in the state court; (vii) that the petitioner was otherwise denied due process of law; and (viii) that the factual determination of the state court is not fairly supported by the record. See 28 U.S.C. §2254(d).

by the evidence, given the testimony of Mr. Kelly that the detachable mask was optional and the fact that petitioner's leafleting companions, including the robed woman, were not similarly masked.[13] To the extent that the state courts' findings amount to legal conclusions, they are open to collateral attack here. See Cuyler, 446 U.S. at 342, 100 S.Ct. at 1715. While it is clearly established that state court conclusions of law are not entitled to the same deference accorded state court factual findings, see Cuyler, 446 U.S. at 342, 100 S.Ct. at 1715, whether federal habeas review of legal conclusions is de novo or in some fashion deferential is a question the Supreme Court has thus far declined to resolve. See West v.

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[13]Nor is there anything in the record to suggest that the trial court erred in according more weight to the testimony of Mr. Kelly than to that of petitioner regarding the significance of the mask.

Wright, ___ U.S. ___, ___, 112 S.Ct. 2482, 2492 (1992). But even assuming the propriety of de novo review, the Court affirms the state courts' conclusion that no First Amendment protection attaches to petitioner's mask-wearing conduct.[14] The testimony adduced at trial and petitioner's pleadings do not establish that the wearing of the mask conveyed a particularized message. It is clear that petitioner's white robes and hood symbolized the Klan's beliefs and were likely to be so understood by those who viewed them. By contrast, as the Klan "Grand Dragon" testified, the mask is an optional accessory to the costume. It follows that the mask contributes nothing to the message already conveyed by the remainder of the costume, nor

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[14]Since the precedent applied in this case predates petitioner's conviction, Teague and its progeny do not bar federal habeas review of this state court determination.

does it convey any independent message.[15] Thus, on the facts presented, petitioner's mask-wearing did not constitute expressive conduct entitled to First Amendment protection because it did not convey a particularized message. See Spence, 418 U.S. at 410-11, 94 S.Ct. at 2730. Given this, the First Amendment analysis properly ends. This Court, accordingly, upholds the decisions of the state courts and dismisses this claim.

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[15]A different result might have obtained had the facts enabled petitioner to argue that by forcing Klan members to unmask themselves, the statute unconstitutionally restricts their First Amendment rights to anonymous speech and free association. See, e.g., Talley v. United States, 362 U.S. 60, 80 S.Ct. 536 (1960); Goland v. United States, 903 F.2d 1247 (9th Cir. 1990); Wilson v. Stocker, 819 F.2d 943 (10th Cir. 1987). Although petitioner presented this claim in his original § 2254 pleadings, counsel for petitioner in oral argument conceded this claim and withdrew it.

Denial of Equal Protection

Next, petitioner advances two equal protection claims. First, petitioner claims that Virginia's anti-mask statute is unconstitutional as construed by the state courts because it irrationally criminalizes wearing Klan hoods with snap-on masks, but not one-piece Klan hoods with non-detachable masks. Petitioner contends that the state courts have improperly vested clothing snaps with constitutional significance, and, therefore have denied equal protection to those Klan members who choose to wear snap-on masks.

Although imaginative, this argument is meritless. Neither the statute nor the state courts attach any significance to the manner with which a mask is attached. The key element of the statute is a mask which is worn "so as to conceal the identity of the wearer.

. . ." Va. Code 18.2-422. How the mask is affixed to the face or costume is of no concern under the statute. Both the snap-on mask wearer and the one-piece hood wearer are treated equally by the statute.[16]

In his second equal protection claim, petitioner argues that the anti-mask statute violates the Equal Protection Clause because it criminalizes "politically-motivated" mask wearing, but not "holiday" or "bona fide theatrical" mask-wearing. Petitioner contends that he would not have been arrested had he been wearing the same costume with a snap-on mask in a theatrical production of Birth of a

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[16]It may be, of course, that if wearing the hood were to constitute symbolic speech under the Spence test, then a person convicted under the anti-mask statute for wearing a hood with a non-detachable mask might successfully argue, on a factual record different from that presented here, that the statute unconstitutionally prohibits him from wearing the hood. Of course, a pair of scissors might suffice to cut the heart out of this argument.

Nation. Such a distinction, asserts petitioner, is a denial of equal protection. This argument is baseless. The exceptions for holiday or theatrical masks do not create a distinction between non-political and politically-motivated mask-wearing. Indeed, politically-motivated mask-wearing for traditional holiday purposes (for example, wearing a Halloween mask caricaturing a political leader) or bona fide theatrical purposes do not violate the statute. The statutory exceptions are not content-based restrictions; rather, they are akin to permissible time, place, and manner restrictions. See Clark, 468 U.S. at 293-94, 104 S.Ct. 3069; cf. Frisby v. Schultz, 487 U.S. 474, 108 S.Ct. 2495 (1988). Simply put, the statute does not criminalize politically-motivated mask wearing. Moreover, petitioner was not arrested for espousing Klan beliefs.

If that were the case, his companions who were also distributing Klan literature would also have been arrested. And significantly, the state tribunals and this Court have determined that neither petitioner's mask, nor the wearing of it, conveyed any political message. Petitioner was arrested not for his political beliefs, but solely for wearing a mask which concealed his identity. Since petitioner's arrest was not politically-motivated and because the statute does not distinguish between political and non-political mask-wearing, this equal protection claim has no merit. Accordingly, petitioner's equal protection claims must be dismissed.[17]

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[17]A successful equal protection attack against the anti-mask statute might be made by a person who also makes out a First Amendment symbolic speech argument.

Due Process

Petitioner contends he was denied Due Process on appeal because the Virginia Court of Appeals found that he had the intent to conceal his identity sufficient to merit his conviction, despite the fact that intent was not an issue at trial. He asserts that the Court of Appeals' findings (i) that intent is an element of a § 18.2-422 violation and (ii) that petitioner had demonstrated such an intent amount to conviction by appellate fiat. Such a conviction, according to petitioner, violates his right to notice and opportunity to be heard as required by the Fourteenth Amendment.

As it happens, the Court need not reach the merits of this claim because petitioner implicitly waived it when, at trial, his counsel conceded a prima facie violation of the statue. Specifically, counsel stated:

> I can at this point, perhaps, give the Commonwealth a hand by stipulating on behalf of the defendant, Buddy Hernandez, that being over sixteen years of age, he did wear the hood or other device whereby a substantial portion of his face was hidden or covered, so as to conceal his identity and did appear in a public place in the City of Fredericksburg, on or about August 13th, 1989. Those facts are not at issue, and a prima facie case is conceded.

Counsel stipulated to a violation of the statute in order to assert a "constitutional" defense. By stipulating to a prima facie case, petitioner effectively admitted all elements of the offense. In so doing, he essentially assumed the risk that subsequent courts might view the statute differently from the way he then interpreted it. Admittedly, counsel's stipulation if a prima facie case does not specifically mention the element of intent. But petitioner cannot be permitted to stipulate to a prima facie case and then, when the constitutional defense fails, seek to

attack collaterally the sufficiency of proof on an element of the offense. Accordingly, this claim must be dismissed.

Sentencing

In his final claim, petitioner asserts that the trial judge impermissibly imposed a more severe sentence than would otherwise have been imposed for a violation of the anti-mask statute for the purpose of punishing him for his Klan beliefs. Petitioner bases his claim on the following statement made by the trial judge at sentencing: "Despite the fact that I disagree with [petitioner's beliefs] wholeheartedly, I am not going to punish him unduly because of those beliefs." Hernandez, 406 S.E.2d at 401. Petitioner contends that use of the word "unduly" indicates that, to some extent at least, the trial judge punished petitioner for his "concededly offensive" beliefs, in violation of the First Amendment.

The Virginia Court of Appeals rejected this view of what occurred; instead it found the trial judge's statement to "mean that the trial court would not punish [petitioner] because of his beliefs to an extent to which he would not otherwise be deserving." 406 S.E.2d at 401. This Court defers to the state appellate court's reasonable interpretation of the trial judge's statement, and, accordingly, dismisses this claim.

Conclusion

As petitioner has failed to demonstrate that his conviction under Va. Code § 18.2-422 was unconstitutional, his petition for writ of habeas corpus is not appropriately granted. Accordingly, the Court grants respondent's motion to dismiss and dismisses this action.

An Appropriate Order shall issue.

/s/
T. S. Ellis, III
United States District Judge

Alexandria, Va
August 26, 1992

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BUDDY HERNANDEZ, Petitioner-Appellant, v. SUPERINTENDENT, FREDERICKSBURG-RAPPAHANNOCK JOINT SECURITY CENTER; ATTORNEY GENERAL OF VIRGINIA, Respondents-Appellees, and CIRCUIT COURT FOR THE CITY OF FREDERICKSBURG, Respondent.	)	No. 92-6980
BUDDY HERNANDEZ, Petitioner-Appellant, v. SUPERINTENDENT, FREDERICKSBURG-RAPPAHANNOCK JOINT SECURITY CENTER; ATTORNEY GENERAL OF VIRGINIA, Respondents-Appellees,	)	No. 92-7139

Appeals from the United States District Court
for the Eastern District of Virginia,
at Alexandria.
T.S. Ellis, III, District Judge.
(CA-92-189-A)
Submitted: February 16, 1993
Decided: October 21, 1993

PER CURIAM:

Buddy Hernandez seeks to appeal the district court's orders refusing habeas corpus relief pursuant to 28 U.S.C. §2254 (1988) and denying a certificate of probable cause to appeal. Our review of the record and the district court's opinion and orders discloses that these appeals are without merit. Accordingly, we deny a certificate of cause to appeal and dismiss the appeals on the reasoning of the district court. Hernandez v. Superintendent, No. CA-92-189-A (E.D. Va. Aug. 27, 1992, and Oct. 8, 1992). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decision process.

DISMISSED

CERAPP.HND

(2)

Supreme Court, U.S.
FILED
JAN 31 1994
OFFICE OF THE CLERK

No. 93-1139

In The

Supreme Court of the United States

October Term, 1993

BUDDY HERNANDEZ,

Petitioner,

v.

SUPERINTENDENT, FREDERICKSBURG RAPPAHANNOCK JOINT SECURITY CENTER, CIRCUIT COURT FOR THE CITY OF FREDERICKSBURG, AND ATTORNEY GENERAL OF VIRGINIA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

SHOULD THE DEFENSE IN A CRIMINAL CASE BE ALLOWED TO STIPULATE THAT THE PROSECUTION CAN PROVE ALL THE ELEMENTS OF THE OFFENSE CHARGED AND THEN, AFTER ITS "CONSTITUTIONAL" DEFENSE HAS FAILED, COMPLAIN ON FEDERAL HABEAS CORPUS THAT THE STATE'S PROOF WAS INSUFFICIENT AFTER ALL BECAUSE ***THE DEFENSE*** HAD MISCONSTRUED THE ELEMENTS OF THE OFFENSE?

REASONS FOR DENYING THE WRIT

Buddy Hernandez was convicted in the Circuit Court for the City of Fredericksburg, Virginia, on February 15, 1990, of having violated § 18.2-422 of the Code of Virginia, which makes it illegal to wear a mask in public with the intent to conceal one's identity. Hernandez now asks this Court to review the actions of the United States Court of Appeals for the Fourth Circuit which affirmed the denial of his federal habeas petition by the United States District Court for the Eastern District of Virginia. *Hernandez v. Superintendent*, Nos. 92-6980 and 92-7139 (4th Cir. 1993) (UP) (Pet's App. at A-56). This is a simple case, however, and the petitioner's argument is simply wrong.

Hernandez' lawyer gratuitously and spontaneously acknowledged at the start of the trial that the Commonwealth could prove that the petitioner had violated § 18.2-422:

> [T]here's no factual contest regarding the commission of the offense charged, and the sole defense, indeed, is a constitutional defense. I can at this point, perhaps, give the Commonwealth a hand by stipulating on behalf of the defendant, Buddy Hernandez, that being over sixteen years of age, he did wear the hood or other devise whereby a substantial portion of his face was hidden or covered, so as to conceal his identity and did appear in a public place in the City of Fredericksburg, on or about August 13th, 1989. These facts are not at issue, ***and a prima facie case is conceded. * * * I don't know if there is anything that the government needs to proceed with since we essentially stipulate to the facts in the case.***

(TR. 12/19/89 at 48-49) (emphasis added). The trial thus proceeded solely in the context of the petitioner's "constitutional defense." This argument, however, was rejected by the court, and he was convicted of violating the statute and given a suspended sentence.

Hernandez argued to the Virginia Court of Appeals that § 18.2-422 was unconstitutionally overbroad on its face. That court, however, rejected his broad reading of the statute, instead holding that, "to violate the statute, an individual must ***intend*** to conceal his identity by covering his face." *Hernandez v. Commonwealth*, 12 Va. App. 669, 672, 406 S.E.2d 398, 400, *appeal refused*, Virginia Supreme Court No. 911102 (1991) (emphasis in original).

The petitioner then complained on federal habeas corpus that the Virginia Court of Appeals had "added" an intent element to § 18.2-422 of which he had not been aware, which had not been litigated at trial and which the evidence supposedly was insufficient to prove. Not surprisingly, the district court found that Hernandez had waived any such complaint because ***the defense*** had conceded a *prima facie* violation of the statute:

> By stipulating to a *prima facie* case, petitioner effectively admitted all elements of the offense. In so doing, he essentially assumed the risk that subsequent courts might view the statute differently from the way he then interpreted it. Admittedly, counsel's stipulation of a *prima facie* case does not specifically mention the element of intent. But petitioner cannot be permitted to stipulate to a *prima facie* case and then, when the constitutional defense fails, seek to attack collaterally the sufficiency of proof on an element of the offense.

Hernandez v. Superintendent, 800 F. Supp. 1344, 1352 (E.D. Va. 1992) (Pet's App. at A-53).*

Hernandez now complains that the district court and Fourth Circuit wrongly rejected his argument about the "intent" element of § 18.2-422 which, according to him, the Virginia Court of Appeals invented out of whole cloth. The fact that § 18.2-422 makes it illegal to wear a mask only when it is intended to conceal the wearer's identity, however, which Hernandez claims first appeared at the appellate level, was of course not "new" at all: The statute on its face makes it illegal to wear a mask covering one's face only if it is done "so as to conceal your identity," and the "[i]ntent thereby to conceal his identity" is an "obvious" implied element of every anti-mask regulation even when not mentioned at all in the provision. *Application of Martin*, 34 Cal. Rpt. 299, 301 (Cal. App. 1963). *See State v. Miller*, 398 S.E.2d 547, 552 (Ga. 1990) (conviction under anti-mask statute like Virginia's "requires the state to prove that the mask is worn with an intent to conceal the identity of the wearer.") Indeed, it is not unusual for a statute to fail to expressly list every element of the crime. *See, e.g., Ginsberg v. New York*, 390 U.S. 620 (1968) (this Court refused to decide whether State had proven beyond reasonable doubt an unstated scienter element after rejecting defendant's overbreadth argument).

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* The district court also found Hernandez' constitutional argument to be without merit. The petitioner did not appeal that issue to the Fourth Circuit and expressly disavows it here. (Pet. at 9 n.3).

The simple truth of the matter is that the reason that this was not an issue at Hernandez' trial is, as the district court found, because ***the defense*** stipulated at the start of the proceedings that Hernandez' wearing of the mask violated the statute and established a *prima facie* case against him, his only defense being a "constitutional" one. The effect of Hernandez' contention would be that, every time a criminal defendant overstates the breadth of a statute in order to support his "constitutional" argument, he could not be convicted when the provision is determined to be more narrow than he contends, which usually is the case. Yet, it is elementary that "[s]tipulations as to facts freely and voluntarily entered into during trial are the equivalent of proof and on appeal neither party will be heard to suggest that the facts were other than as stipulated," *United States v. Campbell*, 453 F.2d 447, 451 (10th Cir. 1972) (defendant cannot claim on appeal that evidence was insufficient after he stipulated critical proof at trial), and that stipulations are binding on the parties who make them. *United States v. Saunders*, 886 F.2d 56, 59 (4th Cir. 1989). In short, having stipulated to evidence at trial, a defendant cannot complain on appeal about the prejudicial effect of its introduction. *United States v. Gwaltney*, 790 F.2d 1378, 1386 (9th Cir. 1986).

CONCLUSION

Apparently what has happened here is that the defense misread the requirement of § 18.2-422 at trial and now regrets its stipulation of a *prima facie* case. An accused, however, "assumes the risk of ordinary error in . . . his attorney's assessment of the law or facts."

McMann v. Richardson, 397 U.S. 759, 775 (1970). In any event, neither the district court nor the Fourth Circuit analyzed Hernandez' argument in the context of the "new rule" doctrine of *Teague v. Lane*, 489 U.S. 288 (1988), as the respondents had requested them to do. The district court and Fourth Circuit thus rejected the petitioner's argument under a more beneficial standard of review than that to which he was entitled. This case is not even a close call under a correct application of the "new rule" doctrine, and this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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